



ENERGY &  
TELECOMMUNICATIONS  
INTERIM COMMITTEE 2017-2018

PO BOX 201706  
Helena, MT 59620-1706  
(406) 444-3064  
FAX (406) 444-3036

Sept. 10, 2018

Exhibit 7

**Energy and Telecommunications Interim Committee**  
**65th Montana Legislature**

**SENATE MEMBERS**

MARY McNALLY--Chair  
NATE McCONNELL  
TOM RICHMOND  
SCOTT SALES

**HOUSE MEMBERS**

DEREK SKEES--Vice Chair  
LAURIE BISHOP  
ZAC PERRY  
DANIEL ZOLNIKOV

**COMMITTEE STAFF**

TREVOR GRAFF, Lead Staff  
JAMESON WALKER, Staff Attorney  
NADINE SPENCER, Secretary

September 10, 2018

TO: Energy and Telecommunications Interim Committee (ETIC)  
FROM: Jameson Walker, Staff Attorney  
RE: Committee powers with respect to MAR Notice 38-2-241: Data Requests

**BACKGROUND**

In the August 24, 2018, Montana Register, the Department of Public Service Regulation (PSC) published Montana Administrative Register Notice 38-2-241 pertaining to discovery procedures during contested case proceedings. In the notice, the PSC proposes to amend 38.2.3301 to allow it to conduct data requests as the primary method of discovery:

38.2.3301 DISCOVERY (1) Techniques of prehearing discovery permitted in state civil actions may be employed in commission contested cases, and for this purpose the commission adopts rules 26, 28 through 37 (excepting rule 37(b) (1) and 37(b) (2) (d) of the Montana rules of civil procedure in effect on the date of the adoption of this rule, and any subsequent amendments thereto. In applying the rules of civil procedure to commission proceedings, all references to "court" shall be considered to refer to the commission; references to the subpoena power shall be considered references to ARM 38.2.3302 through 38.2.3305; references to "trial" shall be considered references to hearing; references to "plaintiff" shall be considered references to a party; and references to "clerk of court" shall be considered references to the staff member designated to keep the official record in commission contested cases. The commission will typically issue a procedural order to govern discovery in each docket. Unless otherwise specified, the commission adopts Rule 26(b) of the Montana Rules of Civil Procedure (excepting Rule 26(b)(4)(C)) which establishes the scope and limits of discovery and Rule 37 which governs discovery abuses and compelling discovery responses, except the commission may not award monetary damages as a discovery sanction. All parties, the commission, and individual commissioners may issue discovery in commission proceedings. Parties may issue discovery to the commission or commissioners only upon motion, and subsequent authorization by the commission.

(2) Nothing in (1) of this rule shall be construed to limit the free use of data requests among the parties. The exchange of information among parties pursuant to data requests is the primary method of discovery in proceedings before the commission. Data requests are the primary method of discovery in commission proceedings. Additional discovery methods permitted by Montana Rule of Civil Procedure 26(a) may also be

utilized in commission proceedings, but only as requested by a party or the commission, and as approved by the commission. The following format for data requests and responses should be used:

(a) assign a unique, consecutive number to each data request (e.g., MCC-001), regardless of the party to whom the request is directed (e.g., the commission may direct PSC-001 through 008 to NorthWestern, PSC-009 through 016 to the MCC, and PSC-017 through 019 again to NorthWestern);

(b) at the beginning of each data request, consistently describe its subject in five words or less. In addition, a party may direct the request to a particular witness or include citations to exhibits or testimony; and

(c) for multi-part requests, use lower case letters (a)-(e) to denote up to five sub-parts.

(3) The following is an example of an acceptable data request or data response:

PSC-006 RE: Purchased Gas Contracts

Witness: Doe, JBD-4:13-15

Request or Response:

a. What risks of bypass would be avoided by the shareholders as a result of the company's proposed treatment?

b. What risks of bypass would be avoided by the ratepayers as a result of the company's proposed treatment?

The PSC will hold a public hearing on September 18, 2018, in Helena, to consider the proposed amendments.

The proposed rule amendment appears related to a recent First Judicial District Court order involving discovery procedures during contested case proceedings before the PSC. In Re Application of Big Foot Dumpsters & Containers, LLC, Cause No. DDV-2018-318 (July 9, 2018). This case involved the PSC conducting data requests as a means of discovery during contested case proceedings. The petitioners argued that the PSC data requests were inappropriate because discovery is for parties to an action and not the adjudicative body. The District Court ultimately ruled that in adversarial proceedings before an adjudicative body, it is inappropriate for the adjudicative body to insert itself into the dispute by submitting discovery. The court also noted that the PSC rule pertaining to discovery did not give it the authority to conduct data requests.

#### RULE OBJECTION UNDER SECTION 2-4-305(9)

Montana Code Annotated Section 2-4-305(9), MCA, allows the ETIC to object to a rule. The objection prevents the publication of the proposed rule until the last possible publication date:

#### **2-4-305. Requisites for validity -- authority and statement of reasons.**

[...]

(9) If a majority of the members of the appropriate administrative rule review committee notify the committee presiding officer that those members object to a notice of proposed rulemaking, the committee shall notify the agency in writing that the committee objects to the proposal notice and will address the objections at the next committee meeting.

Following notice by the committee to the agency, the proposal notice may not be adopted until publication of the last issue of the register that is published before expiration of the 6-month period during which the adoption notice must be published, unless prior to that time, the committee meets and does not make the same objection. A copy of the committee's notification to the agency must be included in the committee's records.

This rule allows a majority of the members of the ETIC to object to a rule, delaying the publication of the rule until the last possible date. In the present case, the last publication date for MAR Notice 38-2-241 will be in February, 2019.

#### RULE OBJECTION UNDER SECTION 2-4-406

Following an objection under 2-4-305(9), the ETIC may file an official objection of the Department's rule under certain circumstances. Pursuant to Section 2-4-406, MCA, the committee must object to the rule and provide a concise statement of its reasons for its actions:

**2-4-406. Committee objection to violation of authority for rule — effect.** (1) If the appropriate administrative rule review committee objects to all or some portion of a proposed or adopted rule because the committee considers it not to have been proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, the committee shall send a written objection to the agency that promulgated the rule. The objection must contain a concise statement of the committee's reasons for its action.

(2) Within 14 days after the mailing of a committee objection to a rule, the agency promulgating the rule shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

(3) If the committee fails to withdraw or substantially modify its objection to a rule, it may vote to send the objection to the secretary of state, who shall, upon receipt of the objection, publish the objection in the register adjacent to any notice of adoption of the rule and in the ARM adjacent to the rule, provided an agency response must also be published if requested by the agency. Costs of publication of the objection and the agency response must be paid by the committee.

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute, the court may award costs and reasonable attorney fees against the agency.